STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH RAY PAYNE,

Defendant-Appellant.

UNPUBLISHED
August 3, 2010

No. 289824
Washtenaw Circuit Court
LC No. 07-001864-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent as I conclude that the officer's actions constituted a *Terry* stop and that under controlling federal and state caselaw, he lacked the particularized and articulable basis required by the Fourth Amendment to conduct that stop.

The majority concludes that the interaction between the officer and defendant did not rise above the level of a "purely voluntary communication" and that even in the face of the officer's actions a reasonable person would have believed that he was free to leave and decline to answer the officer's questions. I disagree. I believe that the officer's actions were clearly a show of authority and that in the face of those actions reasonable persons would, and should, conclude that either they are not free to leave or that if they do not comply with the officer's "requests," the officer is likely to compel their compliance. See *People v Shabaz*, 424 Mich 42, 56-57; 378 NW2d 451 (1985).

"[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Originally, the United States Supreme Court held that a person was seized under the Fourth Amendment "only if, in view of the circumstances surrounding the incident, a reasonable person would of believed that he was not free to leave." *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion of STEWART, J.) adopted in *INS v Delgado*, 466 US 210, 215; 104 S Ct 1758; 80 L Ed 2d 247 (1984). In *California v Hodari D*, 499 US 621, 626; 111 S Ct 1547; 113 L Ed 2d 690 (1991), the Supreme Court concluded that the *Mendenhall* test stated a necessary, but not sufficient, condition to establish seizure of a person through a show of authority. *Id.* at 628. Seizure executed by a show of authority requires actual submission to the show of authority. *Id.* at 628-629. The test "is an objective one: not whether

the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Id.* at 628

The initial encounter between the police officer and defendant, according to the police offer testimony, was when they made "eye contact" in the parking lot of a building where a drug arrest had taken place just shortly before. Defendant turned and walked away from the officer. The officer then followed defendant in his patrol car as defendant walked into a public park. The officer then drove his vehicle off road onto the park "or at least the sidewalk" and, using a loudspeaker, asked defendant if he could speak with him. The police vehicle was a canine unit and a barking police dog was in the back. The officer agreed that the dog's barking was audible outside the vehicle. Defendant stopped and walked back toward the officer, who by now was out of his vehicle, and said to the officer, "Okay, don't let the dog out." The officer was uniformed and armed. The officer also testified that "he used a raised tone of voice" or was yelling when he called to defendant to stop to answer questions.

In my view, it ignores reality to suggest that a person who (1) initially and lawfully attempted to avoid police contact, and was then (2) followed by a police officer accompanied by a barking dog, (3) called to by the police officer in a raised voice amplified by the patrol car's loudspeaker, and (4) approached by the patrol vehicle which the officer drove off-road to get closer to him, simply acted voluntarily, and not in submission to a show of authority.[1]

Given my conclusion that this was an investigatory stop, it is necessary to address whether the officer had a sufficient basis to conduct that stop. While this is a close question, I conclude that the officer did not have a sufficient basis upon which to constitutionally conduct an investigatory stop.

Defendant's behavior in ducking down behind a car when he first saw the police officer is a factor creating suspicion. However, the officer testified that his suspicion was purely inchoate and he did not suspect defendant of any specific crime:

Q. Okay, so he was in the park, correct?

A. Yes.

Q. Okay, and you were not, you were on the sidewalk.

A. Correct.

[1] I am aware that under *Michigan v Chesternut*, 486 US 567, 575; 108 S Ct 1975; 100 L Ed 2d 575 (1988), a police cruiser's following of a defendant without activating a siren or flashers does not, by itself, convey the message that the defendant is not free to disregard the police and go about his business and, therefore, does not require a particularized and objective basis for suspecting the defendant of criminal activity before pursuing him. However, when coupled with the other actions of the officer, I believe this case involves actions that are more than sufficient to convey such a message.

Q. Okay.

A. At the entrance to the park.

Q. And what crime had he committed at this point?

A. None.

Q. Okay, and what crime did you believe that he was involved in?

A. I – none.

Q. So you had no suspicion of any kind of his activities.

A. As to a specific crime?

Q. Yes.

A. None.

When asked to summarize the basis of suspicion regarding defendant's actions, the officer testified, "[Defendant] was in the area of known criminal activity where we'd just executed a successful search warrant for narcotics; that he had made eye contact with me and appeared to have tried to avoid visual contact with me and quickly changed his direction and left the area upon seeing me." In other words, defendant had been seen in an area where a crime had been committed and then acted in such a fashion as to indicate a desire not to speak to the police.

Thus, it was only defendant acting in such a way as to attempt to avoid contact with the police that raised the officer's suspicions. However, the mere desire not to interact with the police cannot serve as the primary basis for the suspicion on which the subsequent contact is based. Otherwise, the right to be left alone by the police has little meaning. In *Shabaz*, the Court addressed this very question and stated:

> Defendant's flight at the approach of police did not, by itself, in the circumstances of this case, support a reasonable suspicion. Although it is uncontroverted that flight may be a factor to be considered in ascertaining whether there is reasonable suspicion . . . flight alone is not a reliable indicator of guilty without other circumstances to make its import less ambiguous.
>
> Certainly it is reasonable to conclude that the defendant's flight away from the vehicle carrying the police officers might have heightened the officer's general suspicion that the defendant must have had something to hide and wished to avoid contact with the occupants of the vehicle. But heightened general suspicion occasion by the flight of a surveillance subject does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity was afoot that is required to justify the temporary seizure approved in *Terry*.
>
> If it were otherwise, any citizen who refuses to answer a plain-clothes police officer's investigate questions during a "tier one" inquiry, and instead

> exercises his constitutional right to "go on his way"—at top speed—would, by the act of exercising his right to "move on," invite a full blown tier two *Terry* "stop and frisk" not because of the addition of any articulable or particularized suspicion of imminent criminal activity, but because he exercised his right to the freedom of movement the Fourth Amendment guarantees. [*Shabaz,* 424 Mich at 62-63 (citations omitted).]

For these reasons, I do not believe that the officer had articulable reasonable grounds to suspect a crime and, because the Fourth Amendment requires such grounds, the lower court should be reversed.

/s/ Douglas B. Shapiro